

REMARKS

This is a response to the non-final Office Action mailed October 4, 2005. At the time of the Office Action, claims 1-30, 32, 33, and 35 were pending. Of these, claims 10 and 20-24 have been cancelled by this response and claims 1, 19, 25, 28-30, 32, 33, and 35 have been amended by this response.

In the Office Action, the Examiner objected to the drawings under 37 CFR 1.83(a); objected to claims 14, 19, and 32 for matters of formality; rejected claim 10 under 35 USC 112, first paragraph; rejected claims 10, 19-20, 32 and 33 under 35 USC 112 second paragraph; rejected claims 1-9, 14, 19-20, 28-30 and 35 under 35 USC 102(b) as being anticipated by Langenbeck; rejected claim 1-7, 11-15, 21-26, and 28-30 under 35 USC 102(e) as being anticipated by Bakersville; rejected claims 22-24 under 35 USC 102(b) as being anticipated by Feldman; rejected claims 10, 16-18, 27, and 32-33 under 35 USC 103(a) as being unpatentable over Langenbeck or Bakersville; and rejected claims 25-27 under 35 USC 103(a) as being unpatentable over Langenbeck.

Objections to the Drawing and Claims

In the objection to the drawing, the Examiner stated that the drawings must show every feature of the invention specified in the claims. The claims have been amended accordingly.

In the objection to claim 14, the Examiner stated that "further" is misspelled. Applicant respectfully submits that the word "further" in claim 14 is spelled correctly.

In the objection to claim 19, the Examiner stated that sound is communicated to the earpiece where it appears that sound is passing through the earpiece. Claim 19 has been amended accordingly.

In the objection to claim 32, the Examiner stated that the trademark ALPHA PVC 319-40/45 is different from the trademark listed in the specification. Claim 32 has been amended accordingly.

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Rejections Under 35 USC Section 112

In the rejection of claim 10 under 35 USC Section 112, first paragraph, the Examiner stated that the specification fails to teach how the 70% quantity was ascertained. Claim 10 has been cancelled.

In the rejection of claims 19-20 under 35 USC Section 112, second paragraph, the Examiner stated that it is not clear whether the representation of the electrical conduit and the acoustic conduit should be the same or different. The claims have been amended accordingly, e.g., claim 20 which refers to an electrical conduit, has been cancelled.

In the rejection of claims 32-33 under 35 USC Section 112, second paragraph, the Examiner stated that ALPHA PVC 3019-40/45 is a trademark and that more positive terms must be used to obviate the uncertainty in trademarks. However, it is respectfully submitted that applicant's representative believes that ALPHA PVC 3019-40/45 is not a trademark, but rather is instead a name used in trade. MPEP 608.01(v) states that a name used in trade is permissible in a patent application if its meaning is established by accompanying definition or if the meaning is well known.

It is respectfully submitted that the meaning is established by an accompanying definition since the name and location of the supplier, ALPHAGARY, is provided at paragraph [0076] of the specification. This allows a person to purchase and have the material and thus fulfills the enablement requirement (one of ordinary skill can obtain the material so as to make and use the invention). Further, evidence that the meaning is well known can be established a Google search of the term "PVC 3019" (which the Examiner can readily repeat), which turns up multiple instances of PVC 3019-40/45 on the Internet.

In the rejection of claim 33, under 35 USC Section 112, second paragraph, the Examiner stated that "the crus of helix" has insufficient antecedent basis. The claims have been amended accordingly.

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Rejections Under 35 USC 102(b) Over Langenbeck

In the rejection of claims 1-9, 14, 19-20, 28-30 and 35 over Langenbeck, the Examiner stated that "Langenbeck teaches a device for facilitating hearing . . . wherein the earpiece is configured for use in either ear." However, applicant respectfully submits that the Langenbeck device is not actually configured for use in either ear, but rather must be re-configured or modified so as to be usable in a different ear from the ear in which it was last used. Langenbeck states "By holding the bow 6 and turning the conical piece 1 on the shaft 7 the holder may be brought from a position (Figs. 1 or 3) in which it fits the right ear into a position (Figs. 2 or 4) in which it fits the left ear." (page 2, column 2, lines 14-19. Thus, the Langenbeck earpiece clearly requires modification (turning the conical piece) for use in one ear and therefore is not configured for use in either ear without modification.

By way of contrast, the earpiece of the present invention is symmetrical (such as about axis A as shown in Figure 1) such that no such modification is necessary when it is switched between ears. Thus, the earpiece of the present invention is configured for use in either ear without modification of the earpiece, as substantially recited in independent claims 1, 25, 28, 29, 30 and 35 as amended.

Rejections Under 35 USC 102(e) Over Bakersville

In the rejection of claims 1-7, 11-15, 21-26, and 28-30 over Bakersville, the Examiner stated that "Bakersville teaches a device for facilitating hearing . . . wherein the earpiece is configured for use in either ear."

However, applicant respectfully submits that the Bakersville device is not actually configured for use in either ear, but rather is configured asymmetrically as shown in Figures 1 and 2 of the Bakersville publication. That is, the Bakersville earpiece has one large lobe (shown on the top of the earpiece in Figure 1 and on the bottom of the earpiece in Figure 2). This large lobe configures the Bakersville earpiece for use in one particular ear.

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Because the Bakersville earpiece is asymmetrical, it cannot be used in either ear. This can be appreciated in the context of attempting to switch the Bakersville earpiece from one ear to the other. In order to switch ears, the Bakersville earpiece must be removed from one ear and flipped over (inverted) before it is inserted into the other ear. Such flipping is needed so that member 26 will be inserted into the other ear (rather than be extending outward therefrom and thereby rendering the earpiece inoperative). The longer lobe is configured to fit within the cymba conchae (a groove above the ear canal). Flipping the earpiece places the large lobe on the bottom, where it cannot be received within the cymba conchae. Thus, such a flipped earpiece will not fit within the conchae and the Bakersville earpiece is therefore not configured for use in either ear.

Indeed, there is no teaching within Bakersville that the earpiece disclosed therein is configured for use in either ear. This earpiece appears to be configured much like any other contemporary earpiece, such as the ones of the Otto Communications advertisements of citations A and B of the Information Disclosure Form filed on May 6, 2004 for this patent application. Such earpieces are sold in both right and left versions because they are not configured for use in either ear.

The Otto online catalog available at the following link shows that both right and left ear earpieces are being sold:

<http://www.bhphotovideo.com/bnh/controller/home?A=search&ci=11995&Q=&O=NavBar>

Rejections Under 35 USC 102(b) Over Feldman

The Examiner rejected claims 22-24 under 35 USC 102(b) over Feldman. Claims 22-24 have been cancelled.

Rejections Under 35 USC 103(a) Over Langerbeck or Bakersville

The Examiner rejected claims 10, 16-18, 27, and 32-33 over Langerbeck or Bakersville. Claims 10, 16-18, and 27 depend from claims that, as amended, are believed to be patentable and 33 has been cancelled. Claim 25 has been amended to recite that the earpiece "is symmetrical."

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Additionally, the Examiner rejected claims 25-27 over Langenbeck. Independent claim 25 has been amended to substantially recite "wherein the earpiece is configured for use in either ear without modification of the earpiece." Modification of the Langenbeck earpiece is required when it is to be used in a different ear, as discussed above.

CONCLUSION

None of the cited references, taken either alone or in combination with one another, either disclose or make obvious "wherein the earpiece is configured for use in either ear without modification thereof." as substantially recited in independent claims 1, 25, 28, 29, 30 and 35 as amended. Further, none of the cited references, taken either alone or in combination with one another, either disclose or make obvious "wherein the earpiece is symmetrical," as substantially recited in independent claim 32.

It is further respectfully submitted that the dependent claims are independently patentable with respect to the independent claims. For example, dependent claims 5-7 recite a limitation based upon symmetry of the earpiece. None of the prior art references appear to teach such symmetry.

In view of the foregoing, it is respectfully submitted that claims 1-9, 11-19, 25-30, 32, 33, and 35 are in condition for immediate allowance. Reconsideration and an early allowance is therefore respectfully requested.

If the Examiner has any questions or concerns, a telephone call to the undersigned at (949) 752-7040 is welcomed and encouraged.

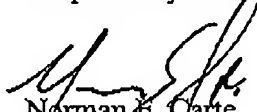
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